Supreme Court, U.S.
FILED
08-473 OCT 13 2008
OFFICE OF THE CLERK

No. 08

In The
Supreme Court of the United States

STATE OF NEW JERSEY,

Petitioner,

v.

CADREE B. MATTHEWS,

Respondent.

On Petition for a Writ of Certiorari
to the Supreme Court of New Jersey

PETITION FOR WRIT OF CERTIORARI

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October 13, 2008

QUESTION PRESENTED FOR REVIEW

Florida v. J.L., 529 U.S. 266 (2000), held that an anonymous tip that a person is carrying a gun, without more, does not justify a stop and frisk of that person. Here, during a lawful detention of an automobile, the police conducted a protective search and secured a handgun they suspected of being in the vehicle due to the totality of threatening circumstances, which included an anonymous report that someone in the vehicle was flashing a gun. Does *J.L.* require suppression of the handgun?

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ON PETITION FOR A WRIT OF CERTIORARI TO THE NEW JERSEY SUPREME COURT

The Petitioner, the State of New Jersey, respectfully prays that a writ of *certiorari* issue to review the judgment and opinion of the Superior Court of New Jersey, Appellate Division, entered in the above-titled proceeding on March 10, 2008. Discretionary review of that opinion was denied by the New Jersey Supreme Court on July 15, 2008.

OPINIONS BELOW

The Order of the New Jersey Supreme Court denying discretionary review in this case is reported at *State v. Matthews,* 196 N.J. 344, 953 A.2d 763 (2008), and is reprinted in the Appendix at 1a. The opinion and judgment of the Superior Court of New Jersey, Appellate Division, which is sought to be reviewed, is reported at *State v. Matthews,* 398 N.J. Super. 551, 942 A.2d 797 (App. Div. 2008), and is reprinted in the Appendix at 2a to 13a. The unreported opinion of the Superior Court of New Jersey, Law Division, is reprinted in the Appendix at 13a to 19a.

JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a). On July 15, 2008, the New Jersey Supreme Court, the highest court in the state, entered an order denying the State of New Jersey's Petition for Certification, which sought discretionary review of the judgment of the New Jersey Superior Court, Appellate Division, which was entered in a reported opinion on March 10, 2008. The Appellate Division ruled that the respondent was entitled to the suppression of evidence under the Fourth Amendment to the Constitution of the United States.

CONSTITUTIONAL PROVISION INVOLVED

CONSTITUTION OF THE UNITED STATES, AMENDMENT IV

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

STATEMENT OF THE CASE

This case represents a potentially dangerous extension of the limited holding of *Florida v. J.L.*, to circumstances for which it was not intended. The lower court's expansive reading of *J.L.* also is in direct conflict with other precedents of this Court, including *Michigan v. Long*, 463 U.S. 1032 (1983), and *Terry v. Ohio*, 392 U.S. 1 (1967), which recognize police authority to conduct a protective search of a lawfully detained motor vehicle when the totality of circumstances supports a reasonable and articulable suspicion that the occupants are armed and dangerous and pose a threat to the investigating officers.

In this case, the Linden police received an anonymous report at 2:30 a.m. that someone was "flashing a gun" in a burgundy Dodge Durango bearing a temporary license tag at a specified location. When the police responded to the location about a minute later, they saw the burgundy Durango with the temporary tag parked across the street from a bar. The Durango had tinted windows that inhibited the officers' view into the vehicle. The officers were able to ascertain that there were at least three occupants, including the driver, in the vehicle, but were not sure if there were others. The testifying officer recounted his experience with automobile stops, which included

vehicles with tinted windows that contained weapons.

As a result of the report of someone in the Durango flashing a gun and the officer's inability to fully see the occupants or what they were doing inside, the officers performed a "high-risk" detention of the Durango as a safety precaution. The officers first ordered the occupants from the vehicle and patted them down for weapons. The officers then searched the passenger area of the Durango for weapons and located a gun underneath the front-passenger seat. The occupants were then arrested.

Meanwhile, Respondent suddenly arrived on the scene and, in an irate and combative manner, repeatedly tried to gain access to the Durango, despite being told by the police that an investigation was underway and that he should leave. He refused and was arrested for disorderly conduct and then for resisting arrest. After his arrest, Respondent confessed that the gun was his and he was ultimately charged with its unlawful possession, a charge to which he pleaded guilty and was sentenced.

Respondent was a party to a motion to suppress the gun, arguing that the seizure of the gun was unconstitutional under *Florida v. J.L.* After an evidentiary hearing on the motion, the judge, in a written opinion, denied defendant's motion to suppress, finding the gun was seized as a result of a lawful motor-vehicle detention and lawful protective search of the vehicle under *Michigan v. Long*, *Pennsylvania v. Mimms*, 434 U.S. 106 (1977); and *Terry v. Ohio*. Although the judge also cited to state caselaw, it is clear that he was relying on the aforementioned cases of this Court as the controlling law. See Appendix at 14a to 19a.

Defendant appealed to the New Jersey Superior Court, Appellate Division, and reiterated his claim that the seizure of the gun was unconstitutional under

J.L. as well as *Alabama v. White,* 496 U.S. 325 (1990). Respondent also relied on several state cases that applied federal authority. The Appellate Division, in a published opinion, ruled that the seizure of the gun violated the Fourth Amendment and reversed the order denying suppression of the evidence. The court ruled that the initial detention of the Durango was lawful. But the court relied on *J.L.*, and state cases interpreting *J.L.*, to rule that the anonymous tip did not justify the ensuing protective search of the lawfully detained vehicle that led to the seizure of the gun.

The State petitioned the New Jersey Supreme Court for discretionary review, asserting that *J.L.* was not intended to apply to cases such as these where the reasons for a protective search were based on the totality of threatening circumstances or where the initial detention of the vehicle was lawful. Rather, the State argued that *J.L.* was intended to apply only when the sole justification for both a stop and frisk was an anonymous tip regarding a person in possession of a gun. The court denied the State's Petition for Certification. See Appendix at 1a.

The State of New Jersey now petitions this Court for a writ of *certiorari* to review the state court's undue expansion of the holding of *J.L.* Unfortunately, the misapplication of *J.L.* is not limited to this case, but is occurring with increasing frequency in similar factual situations in cases around the country, all in conflict with not only *J.L.* itself, but other precedents of this Court as well.

REASONS FOR GRANTING THE WRIT

The State Court's Suppression of a Handgun Found as a Result of a Limited Protective Search of a Lawfully Detained Vehicle is an Unwarranted Extension of the Holding of *Florida v. J.L.* in Direct Conflict with *Terry v. Ohio* and *Michigan v. Long*.

Reflecting a disturbing and dangerous trend among some courts across the nation, the state court in this case misconstrued and misapplied *Florida v. J.L.*, extending that decision far beyond its literal holding and the logic of its rationale. Unless this Court intervenes and clarifies the scope of *J.L.*, police officers in many jurisdictions will be powerless to protect themselves, and the public, when they are dispatched to investigate reports of recent gunplay, especially where, as in this case, the subject vehicle in which the reported gunman was believed to be concealed had darkened windows that prevented the responding officers from making corroborative observations at a safe distance.

The lower court's bizarre ruling that the stop in this case was lawful, but that the ensuing protective frisk of the vehicle was unlawful, reflects how the principles expressed in *J.L.* have been misused by several courts. This turns the reasonableness requirement of the Fourth Amendment on its head by requiring officers either to ignore reports of potential imminent gunplay — a manner of "de-policing" that cannot be tolerated much less condoned given the spate of gun and gang violence across the nation — or else requiring officers to employ unreasonable investigative tactics that would unnecessarily expose them to peril. This Court should now make clear that the required corroboration of anonymous reports under the Fourth Amendment need only be reasonable in the

circumstances, considering the nature and dangerousness of the reported conduct and the investigative options reasonably available to officers who are dispatched into harm's way.

The state court's misapplication of the Fourth Amendment due to its overly broad application of the narrow holding of *J.L.* to penalize reasonable police protective measures during the investigative detention of an automobile by suppressing a gun found as a result is in direct tension with *Terry v. Ohio* and *Michigan v. Long*. This case indeed presents important federal questions involving how and when the Fourth Amendment allows police to protect themselves and the public when conducting lawful investigative detentions of motor vehicles.

The state court found that an anonymous report of a person *flashing* a gun in a specifically described vehicle at 2:30 a.m. was insufficient under *J.L.* to justify a protective search of the vehicle. The court so found despite the fact that when, moments after receiving the report, the police lawfully detained the vehicle matching the description, they were prevented from fully confirming the details of the report because of their inability to adequately see inside the vehicle due to its tinted windows.

The motion judge and appellate court both correctly ruled that the initial detention of the Durango was lawful. But the appellate court unduly extended *J.L.* in reversing the motion judge's well-supported ruling that the scope of the ensuing intrusion into the passenger area of the lawfully detained vehicle was reasonably confined to address the safety concerns presented by the circumstances.

In contrast, the facts of *J.L.* were simple and straightforward. The police received an anonymous call stating that a young, black male, who was standing at a particular bus stop and wearing a plaid

shirt, was carrying a gun. The police went to the bus stop and saw J.L., a 15-year-old black male, standing there wearing a plaid shirt. The police immediately stopped and frisked him and found a gun in his pocket. Given these sparse facts, this Court issued a limited holding: an uncorroborated anonymous tip that a person is carrying a gun, without more, does not justify a stop and frisk of that person. 529 U.S. at 268–69.

J.L. was noteworthy as much for the circumstances to which it did *not* apply as it was for the limited circumstance to which it did apply. *J.L.* does not apply to protective searches where the initial investigative detention is lawful; it only applies when "the initial stop is at issue." *Id.* at 274. *J.L.* does not apply when the totality of circumstances are corroborative of the report to justify the protective search; *J.L.* only applies when a "bare-boned" anonymous tip is the sole justification for a stop and frisk. *Id.* at 271–73. *J.L.* does not address protective searches of lawfully detained automobiles due to the lesser expectation of privacy in them and the dangers inherent in roadside encounters; *J.L.* only applies to the stop and frisk of a person. *Id.* at 273–74. And *J.L.* does not apply when the anonymous report involves the more immediately dangerous and active "flashing" of a gun; *J.L.* applies only to reports of a firearm's mere passive possession. *Id.* at 272–73. The state court's unduly expansive application of *J.L.* undermines this Court's careful balance between protecting investigating officers, while protecting the rights of suspects.

The state court's first improper extension of *J.L.* was to forbid a protective search that took place during a *lawful* investigative detention. The motion judge found the initial investigative detention of the parked Durango to have been lawful. The appellate court affirmed this part of the ruling, and it is not at issue in this petition. *J.L.* is expressly limited to cases in

which the officer's authority to commence the initial forcible stop is at issue. This Court made clear that the holding of *J.L.* "in no way diminishes a police officer's prerogative, in accord with *Terry*, to conduct a protective search of a person *who has already been legitimately stopped.* We speak in today's decision only of cases in which the officer's authority to make the initial stop is at issue." *Id.* at 274 (emphasis added). *Terry* recognized that "police officers in properly discharging their investigative function may find themselves confronting persons who might well be armed and dangerous." 392 U.S. at 25.

But the state court ignored this critical limitation on *J.L.*'s holding and extended its reach to circumstances where it was never intended — and is ill-suited — by finding a protective search during an investigative detention to be unconstitutional under the Fourth Amendment, despite having already found the investigatory detention lawful. *J.L.*'s strictures on police reliance on anonymous tips in deciding when to conduct a stop do not necessarily obtain after the detention has lawfully begun and the police are confronted with a threat of danger. *J.L.* should not be extended to hamstring an officer's on-the-spot discretion to perform a protective search during a lawful detention. "There is no reason why an officer, rightfully but forcibly confronting a person suspected of a serious crime, should have to ask one question and take the risk that the answer might be bullet." *Terry*, 392 U.S. at 33 (Harlan, J., concurring).

Beyond that, the state court misread *J.L.*'s narrow holding to require suppression without considering the other suspicious and threatening factors in the totality of circumstances that elevated the officers' need to protect themselves. *J.L.*'s holding should be invoked only when a "bare-boned" anonymous tip is the sole basis for a stop and frisk. Courts must be careful not to employ *J.L.* so as to eschew a totality-of-circumstances analysis that is

more faithful to the Fourth Amendment. When reviewing the reasonableness of police conduct, courts must consider the totality of circumstances, the "whole picture." *United States v. Sokolow,* 490 U.S. 1, 7 (1989). A "divide-and-conquer analysis" is wholly inappropriate. *United States v. Arvizu,* 534 U.S. 266, 274 (2002). The totality of circumstances in this case amply justified the officers' protective search.

It is well established that, during an investigative detention of a motor vehicle, the police may immediately search those areas of an automobile in which a weapon may be placed or hidden if the police can articulate a reasonable belief that the occupants are armed and dangerous and may gain immediate control of a weapon. *See Long,* 463 U.S. at 1045–53. Essentially, the standard is whether a reasonably prudent officer, considering the totality of the circumstances, would believe that his or her safety and that of others was in danger. *Id.* at 1050.

The officer here credibly articulated reasons why he suspected that the Durango contained a dangerous weapon and that a protective search of the Durango was necessary. The requirement that the police articulate a reasonable suspicion is satisfied by a showing "considerably" less than a preponderance of the evidence. *Arvizu,* 534 U.S. at 274. It is a "rather lenient test," *United States v. Santana,* 485 F.2d 365, 368 (2d Cir. 1973), *cert. denied,* 415 U.S. 931 (1974), which "is obviously less demanding than for probable cause," which itself requires only "a fair probability that contraband or evidence will be found," *Sokolow,* 490 U.S. at 7, and does not even amount to a more-likely-than-not standard. *See Texas v. Brown,* 460 U.S. 730, 742 (1983). Moreover, a "reasonable suspicion can arise from information that is less reliable than that required to show probable cause." *White,* 496 U.S. at 330.

A reasonable suspicion requires that a police

officer merely articulate "some minimal level of objective justification," beyond a mere inchoate and unparticularized hunch that the vehicle may contain a weapon. *Sokolow,* 490 U.S. at 7. The anonymous report in this case, corroborated by the officers' observations and the circumstances, enabled them to articulate a justification far beyond an unparticularized hunch.

A reviewing court should give due weight to inferences drawn from the facts by resident judges and local law enforcement officers because the motion judge views the facts through the distinctive features of the community and the local officers view the facts through their experience and expertise. *Ornelas v. United States,* 517 U.S. 690, 699 (1996). Therefore, when both the motion judge and the responding officer determined that the encounter here was fraught with danger and needed to be quickly addressed, the reviewing court should not have so easily second-guessed them by reflexively invoking *J.L.*

To assess the reasonableness of the officer's limited protective search as a general proposition, it is also necessary to focus on the state interest giving rise to the intrusion. The need to search is balanced against the invasion which the search entails. *Terry,* 392 U.S. at 20–21. In this case, allowing police officers to safely conduct an investigative traffic detention involving potentially armed criminals, is profound. The intrusion here, while not insignificant, was limited to a protective search of the passenger area of a vehicle where a firearm could be located. This limited intrusion was justified given the substantial threat to the officers' safety.

Generally, *J.L.* is ill-suited to govern the protective search of a motor vehicle. Indeed, this Court expressly said that *J.L.* did not "hold that public safety officials in quarters where the reasonable expectation of Fourth Amendment privacy is

diminished . . . cannot conduct protective searches on the basis of information insufficient to justify searches elsewhere." *Id.* Although this Court listed, by way of example, airports and schools, there is no indication or logical reason that this abbreviated list is exhaustive. On the contrary, this Court has repeatedly recognized that automobiles are accorded a significantly reduced expectation of privacy given their pervasive regulation. *See, e.g., California v. Carney,* 471 U.S. 386, 391–93 (1985).

Surely, people do not enjoy the same expectation of privacy in what is placed under the front-seat of an automobile with multiple occupants as they do in the clothing they are wearing. *See Rakas v. Illinois,* 439 U.S. 128, 148–49 (1978) (recognizing no legitimate expectation of privacy for passengers in area under seat of car).[1] *See also United States v. Stanfield,* 109 F.3d 976, 980 (4th Cir.) (recognizing under *Long* that "area search of a vehicle is less intrusive than the frisk of the person"), *cert. denied,* 522 U.S. 857 (1997). Moreover, the exigencies attendant to an automobile's ready mobility that require an immediate search are not present with a pedestrian. *See Carney,* 471 U.S. at 392. *J.L.* was decided in the context of street-corner stop of a juvenile pedestrian and an intrusive frisk of his clothing. The present case entailed the mere act of looking under the front seat of a lawfully detained vehicle.

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[1] Petitioner acknowledges that it has not preserved its right to challenge respondent's right (or standing) to contest the legality of the seizure under the Fourth Amendment on expectation-of-privacy grounds. The State's failure to challenge respondent's standing before the motion court or in its petition to the state supreme court, despite having unsuccessfully raised the issue before the appellate court, likely precludes it from challenging standing in this petition. *See Steagald v. United States,* 451 U.S. 204, 208–11 (1981). Expectations of privacy are discussed herein to substantively show the reasonableness of the officers' conduct and the misapplication of *J.L.* to this case.

In the same manner, this Court also cautioned that the facts of *J.L.* did not require it to speculate about circumstances under which the danger alleged in an anonymous tip might be so great as to justify a search without a showing of reliability. 529 U.S. at 273. This Court has repeatedly recognized that roadside investigative detentions involving suspects in vehicles have proved to be particularly dangerous for the responding officers. *See Long*, 463 U.S. at 1047–48; *Mimms*, 434 U.S. at 110; *Adams v. Williams*, 407 U.S. 143, 148 n.3 (1972). Indeed, this Court has recognized "that a significant percentage of murders of police officers occurs when the officers are making traffic stops." *Mimms*, 434 U.S. at 110 (citations omitted). It is too plain for argument that officer safety is both a legitimate and weighty concern when they conduct investigative detentions of automobiles, even more than during street encounters. *See id.*

If the officers merely detained the vehicle without the ability to search it, they would have been powerless to prevent the occupants from returning to the Durango. As it was, the suspects were all near the Durango during the protective search itself. The officers were reasonable to satisfy themselves that no gun was in the vehicle before they allowed the occupants to leave, which would have enabled them to return to the Durango with the gun inside, creating a potential hazard. As this Court observed in *Long*, "if the suspect is not placed under arrest, he will be permitted to reenter his automobile, and he will then have access to any weapons inside." 463 U.S. at 1051–52. Moreover, when the investigation is one of "close range," the officers are vulnerable, and they must be able to make a quick decision as to how to protect themselves and others from danger without being second guessed on appeal. *Id.* at 1052.

The motion judge correctly found that the police were reasonable to fear that the Durango contained a firearm. In this case, the reliability of the anonymous

report was sufficiently corroborated, not just because the minutes-old report was dead-on in its description of the vehicle and its location, but more importantly, because the officers' own observations independently caused them to suspect that dangerous activity may be afoot. The report became more reliable not only in its tendency to identify a determinant vehicle, but also in its assertion of dangerous criminality. *See J.L.*, 529 U.S. at 272. The officers' firsthand observations of threatening circumstances corroborated the anonymous report by lending credence to the informer's awareness of potentially violent criminal activity. The corroboration thus exceeded the informer's awareness of so-called innocent details, such as the make and color of a vehicle on the street.

Here, the Dodge Durango with temporary tags was parked on the street near a bar in the wee hours of the morning, with at least three occupants concealed behind darkened windows. The time of day and physical location at which the police encounter a motor vehicle are relevant in determining whether to take protective action. *See Long*, 463 U.S. at 1050. And "the fact that there is more than one occupant of the vehicle increases the possible sources of harm to the officer[s]." *Maryland v. Wilson*, 519 U.S. 408, 413 (1997).

The officers' reasonable fears were then greatly enhanced — and their ability to independently corroborate the presence of the gun itself simultaneously eliminated — by the fact that the windows of the Durango were tinted to the extent that the officers had difficulty seeing inside. The substantial danger facing officers when approaching vehicles with heavily tinted windows was discussed by the United States Court of Appeals for the Fourth Circuit. The unanimous opinion by Judge Luttig began by recognizing that "law enforcement officials literally risk their lives each time they approach occupied vehicles during the course of investigative

traffic stops." *Stanfield,* 109 F.3d at 978. "In recognition of the extraordinary dangers to which officers are exposed during such encounters, th[is] Court has consistently accorded officers wide latitude to protect their safety, . . . whenever they reasonably believe their safety might be in jeopardy." *Id.*

But "[t]he advent of tinted automobile windows" poses a "grave risk" to the safety of police officers and "has threatened to bring to naught these essential law enforcement protections." *Id.* "When, during already dangerous traffic stops, officers must approach vehicles whose occupants and interiors are blocked from view by tinted windows, the potential harm to which the officers are exposed increases exponentially, to the point . . . of unconscionability." *Id.* at 981. The Fourth Circuit emphasized, *"Indeed, we can conceive of almost nothing more dangerous to a law enforcement officer in the context of a traffic stop than approaching an automobile whose passenger compartment is entirely hidden from the officer's view by darkly tinted windows." Id.* (emphasis in original).

"As the officer exits his cruiser and proceeds toward the tinted-windowed vehicle, he has no way of knowing whether the vehicle's driver is fumbling for his driver's license or reaching for a gun[.]" *Id.* The officers do not know whether they are about to encounter law-abiding citizens "or to be ambushed by a car-full of armed assailants." *Id.* Responding officers may not even know whether a gun has been trained on them from the moment they arrived on the scene. *Id.* As one officer stated, "'If the suspect has a weapon, I might not see it until he rolls down the window. He may just shoot me through the window.'" *Id.* Since, as this Court noted in *Mimms, see* 434 U.S. at 110, officers face inordinate risks "every time they approach even a vehicle whose interior and passengers are fully visible, . . . the risk these officers face when they approach a vehicle with heavily tinted windows is . . . intolerable." *Id.* at 982. The court noted that

gang members often use tinted windows to hide their illegal activities. *Id.* at 981 n.3. The court further observed that "out of recognition of just such danger," many states had enacted laws regulating tinted windows. *Id.*[2]

During investigative detentions, officers "must make quick decisions" as to how to protect themselves and others when they are "particularly vulnerable," and thus they are not required to adopt "alternate means to ensure their safety." *Id.* at 983 (citations and internal quotations omitted). The Fourth Circuit recognized that this "Court has scrupulously avoided substituting its judgment for that of law enforcement as to how best to ensure officer safety." *Id.*

It would be generally insufficient to merely allow the officers to order the occupants from such a vehicle because the tinted windows could prevent the officers from knowing whether all occupants have been removed and from fully assessing the potential dangers emanating from the vehicle. And the reasonable and necessary order for the occupants to alight may pose "a separate danger unto itself' that must be addressed because it could enable the occupants to move about the vehicle and thereby possibly access a weapon. *Id.* at 983.

The Fourth Circuit was rightly "convinced that the presence of windows so tinted that the vehicle's interior compartment is not visible is, in itself, a circumstance that would cause an officer reasonably to believe that his safety might be in danger[.]" *Id.* at 984. In fact, in a case similar to the present case, the

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[2] Indeed, such windows in the present case could have provided an independent objective basis to detain the Durango. *See* N.J. Stat. Ann. § 39:3-74 (forbidding non-transparent material on windshields and front-side windows); *State v. Cohen*, 347 N.J. Super. 375, 380–81, 790 A.2d 202, 205–06 (App. Div. 2002) (justifying traffic stop due to car's darkly tinted windows).

Second Circuit found that the officers' "inability to see in the darkly tinted car windows, when combined with the report of a firearm in the car, provided a sufficient basis under *Terry* for the officers to further investigate." *United States v. Bold,* 19 F.3d 99, 100–04 (2d Cir. 1994). The court considered the officers' limited ability to confirm the anonymous tip created by the tinted windows to be significant among the totality of circumstances. *Id.* at 104. *See also Holeman v. City of New London,* 425 F.3d 184, 188, 190 (2d Cir. 2005) (finding protective search reasonable after police pulled over car with tinted windows in pre-dawn hours while investigating "prowler call" in "troubled neighborhood"); *United States v. Leland,* No. 03-33-B-W, 2003 U.S. Dist. LEXIS 18852, at *14–15 (D. Me. Oct. 22, 2003) (upholding "high-risk traffic stop" due in part to "dark-tinted windows").

In addition to the dangers inherent in approaching an SUV with tinted windows and containing at least three occupants, perhaps the most significant distinction from *J.L.* lies in the fact the report spoke of the "flashing" of a gun as opposed to its passive concealed possession. The public act of flashing a gun is obviously more immediately dangerous than the mere possession discussed in *J.L.*, which in some states is not even illegal. The firearm here was reported precisely because it was *not* concealed. Rather, its display was seen by someone who thought it necessary to report it to police. This circumstance gave rise to a fair inference that the weapon had just been or was about to be used to shoot, threaten, or intimidate someone. The present case is precisely a situation where "it would be unreasonable to require that police officers take unnecessary risks in the performance of their duties." *See Terry,* 392 U.S. at 23.

The report of the "flashing" of a gun by one of several suspects hidden behind the tinted windows of a vehicle parked near a bar at 2:30 a.m. bespeaks a

potentially fatal and imminent threat to public safety that demands immediate police intervention. This is all too far removed from the mere concealed possession of a gun by J.L., a minor standing in plain view on a street corner, who was not imminently dangerous and whose every move and gesture could have been subject to complete police observation in an attempt to corroborate the report. A pedestrian's movements are exposed to the public and amenable to surreptitious observation without risking "death or injury with every passing moment." *People v. Dolly*, 150 P.3d 693, 697 (Cal.), *cert. denied*, 128 S. Ct. 45 (2007). But inside the tinted-windowed Durango, full corroboration was impossible. The responding officers were compelled to act, and to have done so in way that did not compromise anyone's safety.

Several United States Courts of Appeals have distinguished *J.L.* when the anonymous report indicated an immediate use of a gun as opposed to its concealed possession. *See United States v. Harrell*, 268 F.3d 141, 150–51 (2d Cir. 2001) (Meskill, C.J., concurring) (distinguishing *J.L.* where anonymous tip indicated suspects "waived guns at him" because of imminent danger to community); *United States v. Hicks*, 531 F.3d 555, 557–59 (7th Cir. 2008) (distinguishing *J.L.* from "ongoing emergency" caused by reported threat to shoot someone with pistol); *United States v. Terry-Crespo*, 356 F.3d 1170, 1176 (9th Cir. 2004) (distinguishing report of brandishing or threatening to use handgun as "a contemporaneous emergency event" that is accorded greater reliability than the report of simple possession of gun in *J.L.*); *United States v. Holloway*, 290 F.3d 1331, 1332–40 (11th Cir. 2002) (distinguishing anonymous call reporting ongoing threat of firearm use requiring immediate police action from mere allegation of concealed weapon in *J.L.*), *cert. denied*, 537 U.S. 1161 (2003).

This crucial distinction between a "flashing" gun

or the like versus simple possession was perhaps most cogently identified by the Third Circuit in a 2-1 opinion joined by then-Circuit Judge Alito: "we think that the critical element alleged in the tip was not the mere presence of a gun, but the fact that violent crimes were in the process of being committed." *Nelson v. United States*, 284 F.3d 472, 483 (3d Cir.), *cert. denied*, 537 U.S. 940 (2002). The circuit court agreed with the district judge that a report of ongoing criminal activity should be distinguished from one in which "there's a guy hanging out on the street and he's got a gun on him" and "there was no indication that he was engaged in or about to engage in any kind of criminal activity." *Id.*

The Third Circuit recognized that "J.L. was addressing a tendency by courts to use suspicion of possession of a gun to justify the stop, but it did not disturb [this] Court's consistent prior teaching that an officer, in determining whether there is reasonable suspicion, may take into account reports of an active threat, including the presence and use of dangerous weapons." *Id.* In short, "J.L. did not disturb the officers' ability to consider the prospect of harm to others or to themselves" when conducting a investigative detention. *Id.* A dissenting judge, however, disagreed and found no such distinction. *See id.* at 485–89 (Ambro, J., dissenting).

Indeed, Judge Ambro's dissent in *Nelson* is noteworthy precisely because it is emblematic of system-wide confusion. Despite the logic and precedential support for the police action here, confusion does indeed exist in applying *J.L.* to cases like this. This Court's intervention is thus urgently needed. For example, a district court's opinion, which was later reversed on other grounds, tried to reconcile the Third Circuit's reasoning in *Nelson* with *J.L.*, but found that an anonymous report that "a male had just flashed a gun at 'a bum,' at Broad and South Streets in Philadelphia" did not pose a sufficient risk of danger to

justify police intervention. *United States v. Torres*, No. 06-630, 2007 U.S. Dist. LEXIS 8414 (E.D. Pa. Feb. 5, 2007), *rev'd o.g.*, 534 F.3d 207 (2008). But that "bum" on the wrong end of that flashing gun might respectfully disagree.

Conversely, in the Fourth Circuit, a district court ruled that an anonymous report describing the threatening "brandishing" of a firearm distinguished that case from *J.L. See United States v. Elston*, 2005 U.S. Dist. LEXIS 45310, at *9–10 (W.D. Va. April 18, 2005). The Court of Appeals affirmed the district court, agreeing that the tip relayed an imminent threat to public safety, thus distinguishing *J.L.* The court ruled that the imminent threat faced by the officers carried substantial weight in assessing the reasonableness of their actions. 479 F.3d 314, 319 (4th Cir. 2007).

Courts have also found that an anonymous report of an erratic driver justifies a traffic stop because a drunk driver is a far more grave and immediate threat to public safety than the mere passive possession of a concealed gun. *See, e.g., United States v. Wheat*, 278 F.3d 722, 724–37 (8th Cir. 2001). But the California Supreme Court correctly found that a report of the immediate threat occasioned by the use of a gun, as opposed to its mere passive possession, is an equal threat to public safety and recognized that "there is no reason to think that anonymous phoned-in tips concerning contemporaneous threats with a firearm are any more likely to be hoaxes than are anonymous phoned-in tips concerning a contemporaneous event of reckless driving." *Dolly*, 150 P.3d at 694–701. Indeed, "the interest in protecting human life . . . is . . . an important factor to consider in assessing the requisite level of reliability." *Id.* at 698.

Florida, however, the state from which *J.L.* arose, has come to the opposite conclusion from the Third Circuit and California — but not without

significant internal disagreement. In a case in which an anonymous caller reported that a person was "waving" a firearm, an intermediate Florida court distinguished *J.L.* by recognizing that "the content of the original tip described not merely the easily falsified and otherwise unverifiable fact that the defendant was carrying a concealed firearm as in *J.L.*, but rather the quite obvious and extremely dangerous fact that a firearm was being openly displayed." *Baptiste v. State,* 959 So.2d 815, 816 (Fla. Dist. Ct. App. 2007). That court found that under such "circumstances, the 'tip' itself rendered it reasonable to effect the stop necessary to inquire further." *Id.*

A deeply divided Florida Supreme Court subsequently quashed this holding as violative of the Fourth Amendment under *J.L.* and said that "the officers could have approached Baptiste and engaged him in conversation." *See* No. SC07-1453, 2008 Fla. LEXIS 1614 (Fla. Sept. 18, 2008). One concurring justice did not sign on with the majority's reasoning, see *id.* at *46 (Cantero, S.J., concurring), and a strong two-justice dissent recognized the danger of preventing the police from taking immediate protective measures and the futility of the exclusionary rule under such circumstances. *Id.* at *46–58 (Wells, J., dissenting).

To illustrate just how dangerously *J.L.* has been misconstrued, we need only look to the majority opinion in *Baptiste* that endorsed an earlier lower court ruling, *see Rivera v. State,* 771 So.2d 1246 (Fla. Dist. Ct. App. 2000), that a report that the "occupants of two vehicles are *actively exchanging gunfire"* to be insufficient under *J.L.* to justify a *Terry* stop. *See* 2008 Fla. LEXIS 1614, at *38–41. Petitioner here urges that the dissenting opinion in *Baptiste*, as well as the lower court's opinion, are more faithful to the careful balance struck by the Fourth Amendment and the holdings of *J.L.*, *Long,* and *Terry*. It would be potentially fatal to both responding officers as well as to members of the public at large if an officer who has

a duty to respond but is powerless to investigate the active exchange of gunfire, beyond merely observing the suspects, without having the authority to take reasonable protective measures.

Like Florida, Virginia has also rejected the approach of most federal circuits and California and inappropriately given *J.L.* a blunderbuss application. In *Jackson v. Commonwealth,* 594 S.E.2d 595 (Va. 2004), the Virginia Supreme Court reversed a correct application of *J.L.* by the Court of Appeals of Virginia (which itself was the product of a 6–4 ruling). *See* 583 S.E.2d 780 (Ct. App. Va. 2003) (en banc). Virginia's high court disregarded the totality of circumstances that distinguished the case from *J.L.*, most notably the immediacy of the threat conveyed by the report of a "brandished firearm in a car," and suppressed the fruits of the search largely because the anonymous tip did not convey predictive information. 594 S.E.2d at 601–03. A majority of the Virginia appellate court had appropriately distinguished *J.L.* because the report of a brandished firearm is an open and obvious crime that presents an imminent public danger for which *J.L.* was not intended to preclude reasonable police protective measures. 583 S.E.2d 788–93. The appellate court cogently recognized that the consequences of such an inflexible application of *J.L.* are "unwise at best and dangerous at worse." *Id.* at 791. Petitioner urges that the Virginia appellate court's majority opinion represented a sounder reading of *J.L.*

Like the Virginia Supreme Court, the New Jersey court's application of *J.L.* held the anonymous report to an unrealistic standard. This Court's rejection of the so-called "firearm exception" in *J.L.* should not be read to eliminate or discourage reliance on anonymous tips among the totality of circumstances when an immediate threat is reported. Rather, this Court simply held that an uncorroborated anonymous tip about a person with a gun cannot be the *sole, per se*

basis for the stop and frisk. 529 U.S. at 272. Here, the anonymous report of a displayed gun was corroborated by the suspicious and threatening circumstances.

Indeed, Congress has recognized that the brandishing of a gun is worthy of more punishment than its mere possession when committing a crime. *See* 18 U.S.C. § 924(c)(1)(A)(ii) (assessing minimum term of seven years for brandishing as opposed to five years for merely possessing). In New Jersey, such flashing in the presence of others itself could have been an aggravated assault. *See* N.J. Stat. Ann. § 2C:12-1 (knowingly pointing firearm, whether or not it was loaded, in direction of another with extreme indifference to human life is aggravated assault).

As we have become all too aware, concerned citizens throughout this country are routinely being frightened into silence, fueling the perception that violent street gangs can terrorize our most vulnerable communities with virtual impunity. To break this vicious cycle of crime and intimidation, police *must* act when an anonymous report warns of immediate gun use. Reviewing courts, in turn, must recognize and safeguard the community's right to be free from the plague of gun violence.

Long before the current arms race among "Bloods" and "Crips," and before gang members earned their "stars" by shooting innocent bystanders and police officers, this Court has been sensitive to the value of anonymous tips in helping the police perform their most basic duty to protect society. *Illinois v. Gates*, 462 U.S. 213, 237 (1983). Indeed, "a standard that leaves virtually no place for anonymous citizen informants is not required" by the Fourth Amendment. *Id.* at 238. The danger in according too little weight to anonymous tips was forcefully stated by the United States Court of Appeals:

> There is the equal danger . . . that

> according no weight to "anonymous" tips in the reasonable suspicion calculus will undermine the ability of concerned citizens to report illegal activity and to thereby make their neighborhoods more safe. Residents of neighborhoods are in the best position to monitor activity on the street. But residents, also fearful of the consequences, might not always wish to identify themselves and volunteer their names. According no weight as a matter of law to such anonymous tips would only discourage concerned residents from even calling police, would burden the rights of ordinary citizens to live in their neighborhoods without fear and intimidation, and would render citizens helpless in their efforts to restore safety and sanctity to their homes and communities.

United States v. Perkins, 363 F.3d 317, 326 (4th Cir. 2004), *cert. denied*, 543 U.S. 1056 (2005). *J.L.* was simply a commonsense recognition that reliance on an anonymous tip *alone* requires scrutiny. The opinion did not signal a departure from *Gates* to virtually eliminate the use of an anonymous report in the totality of circumstances equation.

Petitioner urges this Court to reaffirm its realistic and flexible approach when deciding whether an anonymous report has been sufficiently corroborated. *See id.* at 325 ("A rigid rule demanding the presence of predictive information is thus unjustified by *White* and *J.L.*, and it would be wholly inconsistent with the flexible nature of reasonable suspicion analysis.") *But see United States v. Reaves*, 512 F.3d 123, 124–28 (4th Cir. 2008) (invalidating investigative stop under *J.L.* due mainly to lack of predictive information in anonymous tip).

Specifically, when police respond to an anonymous report regarding the active handling and use of a gun, a reviewing court examining the "predictive aspects" of the tip should neither require nor expect police to delay pre-emptive action until they personally observe the suspect repeat his unlawful gun display. While such forbearance might be appropriate in the case of an anonymous tip of ongoing drug activity, the consequences of such delay in reacting to a recent report involving the "flashing" of a gun are far too dire. Had the officers here waited until an occupant flashed a gun at them, assuming the officers survived, the resulting Fourth Amendment event could have escalated well beyond a mere stop or a frisk and turned fatal. *Cf. Tennessee v. Garner,* 471 U.S. 1 (1985) (holding that police use of deadly force is governed by Fourth Amendment).

Aside from these life-and-death concerns, it would make no sense to require police officers to personally observe a replay of the reported gun flashing as a prerequisite to reasonable suspicion, since any such direct observation of a gun by police would constitute full probable cause, sailing past the much lower and more flexible reasonable suspicion level of proof, rendering the *Terry* standard redundant and irrelevant.

When, as in this case, police respond to an anonymous report of a gun being flashed and personally observe suspicious circumstances, those firsthand observations satisfy the corroboration requirement, even though the officers have yet to actually see the reported firearm itself. That conclusion is consistent with a faithful reading of *J.L.,* where this Court emphasized that the officers in that case had not personally observed any suspicious circumstances and relied exclusively on a "bare-boned" tip. 529 U.S. at 274.

Petitioner asks this Court to heed Chief Judge

Friendly's warning that "courts should not set the test of sufficient suspicion that the individual is 'armed and presently dangerous' too high when protection of the investigating officer is at stake." *United States v. Riggs,* 474 F.2d 699, 705 (2d cir.), *cert. denied,* 414 *U.S.* 820 (1973). Petitioner urges a realistic assessment of police behavior, mindful of the persistent violence in society. Applying such a realistic approach to the present facts, and recognizing that on the front line against violence, the police are particularly vulnerable, the officers acted as they were reasonably expected to act. Certainly, police officers in these circumstances would be derelict in their duty if they did not take action to protect the public.

In that regard, we cannot help but add that protective-search jurisprudence should not be obsessively driven by the speculative possibility that an anonymous caller might be a prankster. This purported risk should not be overstated. Petitioner is not aware of any empirical study showing that anonymous callers are more likely to be lying than not. *See Dolly,* 150 P.3d at 699 (recognizing absence of any indication that such false and malicious communications present a widespread problem). It is reasonable to believe that at least "a fair percentage" of anonymous calls are truthful. Indeed, "a fair probability" is the benchmark for probable cause, a far more stringent standard than reasonable suspicion.

Anonymous tips, as with all other evidence, should be viewed through the prism that reasonable suspicion, like probable cause, deals with probabilities, not certainties. Thus police reliance on this information in determining whether to conduct a protective search when life and limb is at stake is reasonable; it would be foolhardy to ignore it. In fact, this Court recognizes that *Terry* accepts the risk that officers may stop and frisk innocent people, and that possibility does not render the police investigative action unreasonable. *See Illinois v. Wardlow,* 528 U.S.

119, 126 (2000).

This Court has taken care when weighing an anonymous report to "hold the balance true" and to rely on "balanced judgment rather than exhortation." *Gates,* 462 U.S. at 241. The balance of risks in this case clearly weighs in favor of what the officers did. "'[T]he risk of false tips is slight compared to the risk of not allowing the police immediately to conduct an investigatory stop.'" *Dolly,* 150 P.3d at 699 (quoting *Wheat,* 278 F.3d at 735). If the anonymous report of the flashing gun were false, then the police would have conducted an unnecessary protective search of the Durango — a potentially embarrassing intrusion to be sure. But if the accurate report of the flashing gun were ignored, someone could have been shot and killed. A true constitutional balance would allow a brief, minimally intrusive protective search of the vehicle, rather than ban protective searches based in part on anonymous tips. Balanced judgment under these circumstances recognizes the significance of the anonymous report and rejects the reflexive and simplistic exhortations against these crucial leads.

Indeed, a question left unanswered by the state court is: what should the officers have done? Surely no one would suggest that the officers do nothing. That would be inconsistent with their duty to protect the public. Patient observation here would have been inappropriate, given the immediate and deadly capacity of a drawn gun to be fired. Nor could the officers have safely initiated a consensual field inquiry, since they would have recklessly exposed themselves to potential gunfire had they casually approached the vehicle while its multiple occupants remained concealed from view behind darkened windows. Nor could they have allowed the occupants back into the lawfully detained vehicle after having ordered them out, without first satisfying themselves that the vehicle did not contain a weapon. "When officer safety . . . is at issue, officers should not have to make fine

judgments in the heat of the moment." *Thornton v. United States,* 541 U.S. 615, 632 (2004) (Scalia, J., concurring).

The officers in these circumstances had no practical choice but to do what they did — initiate a high-risk detention of the Durango and perform a limited intrusion into the passenger area to secure the gun. The same circumstances that justified the initiation of this encounter necessitated the safety precautions that were taken, including the protective frisks to find and secure the firearm that figured so prominently in the anonymous report that triggered this investigation. *See Terry,* 392 U.S. at 19–20 (determining the reasonableness of a protective search involves a dual inquiry: "whether the officer's action was justified at its inception, and whether it was reasonably related in scope to the circumstances which justified the interference in the first place").

In the face of the real world's dangers, peace officers dispatched into harm's way must be allowed to take objectively reasonable precautions. That being so, reviewing courts must take care not to issue rulings that are too far removed from how the police actually gauge risks and perform their duties. Indeed, the facts of this case illustrate the emergent need to secure a firearm suspected of being in a detained motor vehicle that is under investigation. Respondent appeared in the midst of the encounter in an agitated state and violently tried to enter the vehicle, presumably to get the handgun that he later confessed to possessing. Had the police not performed a protective search of the car, the suspect could have reached for the gun, creating an untold hazard for all concerned. This case confirms that dangerous consequences are not hypothetical, as reflected in statistics cited by this Court that demonstrate all too clearly that law-enforcement officers face a high risk of violence when conducting traffic stops. *See, e.g., Wilson,* 519 U.S. at 413.

Finally we must note how inapt the remedy of exclusion is here. The motion judge factually found that the officers implemented the high-risk investigative detention and protective search of the Durango out of fear for their own safety and that of the public. When officers credibly testify that they acted out fear of danger to human life and limb, and their good faith actions were limited to alleviating that fear, reflexive application of the exclusionary rule utterly fails to serve its deterrent purpose. *See Hudson v. Michigan,* 547 U.S. 586, 591–99 (2006). Particularly during a rapidly unfolding investigative detention, peace officers will act — and indeed they should be encouraged to do so — to protect life and limb, irrespective of the later possibility of suppression.

Indeed, this Court so observed in *Terry*: "Regardless of how effective the [exclusionary] rule may be where obtaining convictions is an important objective of the police, it is powerless to deter invasions of constitutionally guaranteed rights where the police either have no interest in prosecuting or are willing to forego successful prosecution in the interest of serving some other goal." 392 U.S. at 14. "[A] rigid and unthinking application of the exclusionary rule, in futile protest against practices which it can never be used effectively to control, may exact a high toll in human injury and frustration of efforts to prevent crime." *Id.* at 15. Thus even when an appellate court might later disagree with the officers' good-faith, on-the-spot decision to protect themselves, exclusion is disproportionate and unjust, providing an undeserved windfall to a dangerous criminal without any corresponding protection to Fourth Amendment rights.

To conclude, *J.L.* was narrowly drawn and should remain confined to those cases in which the only reason the police stopped and frisked a person was an anonymous tip about a person carrying a gun. *J.L.* was not designed to deal with the many emergencies that the police face in the performance of

their duties. As the foregoing discussion demonstrates, the outer limits of *J.L.'s* utility in protective-search jurisprudence are inconsistently applied by the various federal circuits and state courts. This petition presents a unique opportunity for this Court to clarify when *J.L.* should be applied to discourage police conduct, and more importantly, when it should not.

CONCLUSION

Based on the foregoing arguments, Petitioner respectfully urges that this petition for a writ of *certiorari* be granted.

Respectfully submitted,

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Dated: October 13, 2008

APPENDIX

STATE OF NEW JERSEY, Plaintiff-Petitioner, v. CADREE B. MATTHEWS, Defendant-Respondent.

C-1140 September Term 2007, 62,507

SUPREME COURT OF NEW JERSEY

196 N.J. 344; 953 A.2d 763; 2008 N.J. LEXIS 984

July 11, 2008, Decided
July 15, 2008, Filed

PRIOR HISTORY: *State v. Matthews, 398 N.J. Super. 551, 942 A.2d 797, 2008 N.J. Super. LEXIS 53 (App. Div., 2008)*

JUDGES: [*1] Honorable Stuart Rabner, Chief Justice.

OPINION

ON PETITION FOR CERTIFICATION

To the Appellate Division, Superior Court:

A petition for certification of the judgement in A-6040-05 having been submitted to this Court, and the Court having considered the same;

It is ORDERED that the petition for certification is denied.

WITNESS, the Honorable Stuart Rabner, Chief Justice, at Trenton, this 11th day of July, 2008.

NOT FOR PUBLICATION WITHOUT THE APPROVAL OF THE APPELLATE DIVISION

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-6040-05T4

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

CADREE B. MATTHEWS,

Defendant-Appellant.

Submitted February 4, 2008 - Decided March 10, 2008

Before Judges Lintner, Sabatino and Alvarez.

On appeal from the Superior Court of New Jersey, Law Division, Union County, Indictment Nos. 05-05-0554 and 05-05-0556.

Yvonne Smith Segars, Public Defender, attorney for appellant (Michele C. Buckley, Designated Counsel, on the brief).

Theodore J. Romankow, Union County Prosecutor, attorney for respondent (Sara B. Liebman, Assistant Prosecutor, of counsel and on the brief).

The opinion of the court was delivered by

LINTNER, P.J.A.D.

Following a denial of his motion to suppress and a subsequent unsuccessful *Miranda*[3] hearing, defendant, Cadree B. Matthews, pled guilty to third-degree unlawful possession of a weapon, *N.J.S.A.* 2C:39-5b (Count One) and third-degree resisting arrest, *N.J.S.A.* 2C:29-2a (Count Two), as charged in Union County Indictment Number 05-05-0554.[4] Defendant also pled guilty to second-degree unlawful possession of a handgun by a person having previously been convicted of Possession of a Controlled Dangerous Substance with Intent to Distribute, *N.J.S.A.* 2C:39-7b, as charged in Union County Indictment Number 05-05-0556. He reserved the right to appeal the denial of his motion to suppress the gun recovered by the police.

The judge granted the State's motion for an extended term as a persistent offender, *N.J.S.A.* 2C:44-3a, and imposed a ten-year term of incarceration with five years of parole ineligibility on the conviction of possession of a weapon by those previously convicted, *N.J.S.A.* 2C:39-7b. On each of the remaining third-degree offenses, the judge imposed concurrent five-year terms to run concurrent with the ten-year term.

The central issue presented by this appeal is whether an anonymous tip, standing alone, can form the basis for a *Terry*[5] stop and frisk search, as well as a search of a motor vehicle. We hold that, under the circumstances of this case, both the stop and frisk and the search of the vehicle violated the Fourth

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3 *Miranda v. Arizona*, 384 *U.S.* 436, 86 *S.Ct.* 1602, 16 *L.Ed.*2d 694 (1966).

4 Defendant and four other individuals were charged as codefendants. The charges against the codefendants were later dismissed.

5 *Terry v. Ohio*, 392 *U.S.* 1, 88 *S.Ct.* 1868, 20 *L.Ed.*2d 889 (1968).

Amendment prohibition against unreasonable searches and seizures. Accordingly, the order denying the suppression of the evidence and the judgment of conviction on both weapons offenses are reversed.

The following undisputed facts emerged from the suppression hearing. On February 19, 2005, at approximately 2:30 a.m. while on patrol in his marked vehicle, Officer James Edgar of the Linden Police Department received a radio report from headquarters that an individual in a burgundy Durango with a temporary tag was flashing a gun at the 1100 block of East St. George Avenue in Linden. Edgar and Officer Birch responded in separate police vehicles and arrived at the scene, described as a well-lit business district.

As Birch and Edgar converged on the Durango, they considered it to be a "high risk traffic stop." The Durango had dark-tinted windows, making it difficult to see inside. Birch ordered the driver to take the keys out of the ignition, place them on the roof, and exit the vehicle. He complied. A pat-down search of the driver did not turn up any weapons. The two remaining occupants sitting in the rear of the Durango were ordered out of the car. A pat-down search of both passengers also revealed no weapons. Other officers arrived at the scene. After the driver and occupants were taken to a secure location, several officers searched the vehicle for weapons. The driver and occupants were then arrested. Photographs were taken of the gun and its location in the car.

Meanwhile, a black male, later identified as defendant, approached the scene and made several attempts to get into the vehicle. The officers told defendant that there was an investigation in progress and to leave the scene. He refused, became irate and combative, and again tried to get into the Durango. As a result, defendant was placed under arrest. While in the back seat of Edgar's police vehicle in handcuffs,

prior to being advised of his *Miranda* rights, defendant volunteered that the gun was his. Later at headquarters, after being given his *Miranda* rights, defendant made a similar statement.

Denying defendant's motion to suppress the gun, the judge issued a letter opinion posing the following rhetorical question and answer:

> Safety of the officers is both legitimate and weighty. The pat-down search revealing negative results, the question then becomes whether or not the officers violated any of the defendants' rights by going further and searching the motor vehicle or whether the officers, having found no weapons on the pat-down search, should have permitted the occupants of the vehicle to return to the vehicle without securing that vehicle to assure that there were no guns in the vehicle. Stating the question states the answer. The same exigencies, articulable suspicion, and justification that allows the pat-down search for the protection of the officers and the public, allows the minimal intrusion into the vehicle compartment to make sure the vehicle was safe for the public and the officers. To conduct a protective weapons search of the car, the police are required to conform to the [*Terry*] standard. Here the information and confirmation of same provides the basis for the validity of the stop and the scope of the search to the inner compartment of the vehicle was reasonably confined to safety concerns. (citations omitted.)

On appeal, defendant raises the following points:

Point I
THE TRIAL COURT COMMITTED REVERSIBLE ERROR IN DENYING [DEFENDANT'S] MOTION TO SUPPRESS THE EVIDENCE SEIZED WHERE THE POLICE ILLEGALLY STOPPED AND SEARCHED THE VEHICLE WITHOUT PROBABLE CAUSE.

a. The information provided by an unnamed informant did not provide an objectively reasonable suspicion necessary to justify the "stop and frisk" of the individuals in the vehicle.

b. The officers did not have an articulable suspicion that the occupants of the vehicle posed a danger justifying the warrantless search of the vehicle.

POINT II
THE COURT ABUSED ITS DISCRETION IN SENTENCING [DEFENDANT] TO AN EXTENDED TERM OF IMPRISONMENT AND DID NOT ADEQUATELY CONSIDER THE MITIGATING FACTORS IN THIS CASE.

POINT III
PURSUANT TO THE NEW JERSEY SUPREME COURT'S RECENT HOLDING IN *STATE V. PIERCE*, DEFENDANT'S SENTENCE MUST BE VACATED AND HIS CASE REMANDED TO THE LOWER COURT FOR RESENTENCING.

Defendant challenges both the stop and entry into the vehicle to search for the weapon. The State asserts that the anonymous tip provided a reasonable suspicion to permit the stop and search of the Durango, thus passing constitutional muster. The State also argues, for the first time on appeal, that

because defendant abandoned the gun he is not afforded protection under the Fourth Amendment.

The United States Constitution protects the "right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures . . . ." *U.S. Const.* amend. IV, § 1; *see also N.J. Const.* art. I, ¶ 7. Whether a seizure or stop is unreasonable is often times a "complex" issue "peculiarly dependent upon the facts involved." *State v. Anderson*, 198 *N.J. Super.* 340, 348 (App. Div.) (citing *State v. Funicello*, 60 *N.J.* 60, 72 (Weintraub, C.J., concurring), *cert. denied*, 408 *U.S.* 942, 92 *S.Ct.*2849, 33 *L.Ed.*2d 766 (1972)), *certif. denied*, 101 *N.J.* 283 (1985). The circumstances here involve the validity of the police officers' stop and search under *Terry*, specifically, the "protective stop" exception. *See State v. Roach*, 172 *N.J.* 19 (2002). Under the protective stop exception, the State must demonstrate that the police had an objective, articulable, and reasonable basis to believe the subject of the stop was armed and dangerous. *Id.* at 27.

The propriety of the investigatory stop also involves the community caretaking function and the common law right to inquire based upon the belief that criminal activity may be involved. Generally, investigatory stops of automobiles are justified by a reduced expectation of privacy by an occupant of an automobile. *United States v. Martinez-Fuerte*, 428 *U.S.* 543, 561, 96 *S.Ct.* 3074, 3084-85, 49 *L.Ed.*2d 1116, 1130 (1976). A police officer may stop a motor vehicle where there is a reasonable or articulable suspicion that a motor vehicle violation has occurred. *Delaware v. Prouse*, 440 *U.S.* 648, 663, 99 *S.Ct.* 1391, 59 *L.Ed.*2d 660 (1979); *State v. Carter*, 235 *N.J. Super.* 232, 237 (App. Div. 1989); *State v. Nugent*, 125 *N.J. Super.* 528, 534 (App. Div. 1973); *State v. Griffin*, 84 *N.J. Super.* 508, 516 (App. Div. 1964).

The community caretaking function may also be

implicated where something abnormal is observed concerning the operation of a motor vehicle. *State v. Martinez*, 260 *N.J. Super.* 75, 78 (App. Div. 1992). Such abnormal situations may be suggested by a number of objectively reasonable concerns:

> (a) something might be wrong with the car; (b) something might be wrong with its driver; (c) a traffic safety hazard is presented to drivers approaching from the rear when an abnormally slow moving vehicle is operated at night on a roadway without flashers; (d) there is some risk that the residential neighborhood is being "cased" for targets of opportunity.
>
> [*Ibid.*]

We also recognized that the first three concerns triggered the "community caretaking function," while the fourth implicated the "common-law right to inquire" based upon a founded suspicion that criminal activity might be afoot. *Ibid.*

An "anonymous tip standing along cannot justify a *Terry* stop." *State v. Richards*, 351 *N.J. Super.* 289, 303-04 (App. Div. 2002); *see also Florida v. J.L.*, 529 *U.S.* 266, 120 *S.Ct.* 1375, 146 *L.Ed.*2d 254 (2000). In *J.L.*, the United States Supreme Court declined to adopt the "man with a gun" exception to justify a *Terry* stop and frisk based upon an anonymous tip alone. *J.L.*, *supra*, 529 *U.S.* at 272-74, 120 *S.Ct.* at 1379-80, 146 *L.Ed.*2d at 260-62. The Court held that an anonymous tip based upon a "bare report of an unknown, unaccountable informant" lacks the "indicia of reliability" to justify a stop and frisk. *Id.* at 271, 120 *S.Ct.* at 1379, 146 *L.Ed.*2d at 260. This is especially so where the tip is not recorded as it would be in a 9-1-1 call, or where the tipster is unknown. *See State v. Golotta*, 178 *N.J.* 205, 225-26

(2003). *Golotta* involved a 9-1-1 call where the anonymous caller reported a pickup truck being driven erratically. The Court distinguished between an anonymous tip of erratic driving and a tip regarding a person with a gun.

> Perhaps most important, here the officer was confronted with a risk of imminent danger to defendant and to the public, a circumstance that allowed the officer less corroboration time than if the tip had alleged that an individual standing passively on the street corner was carrying a concealed weapon. Although unlawfully concealing a weapon poses a public-safety risk, driving a pickup truck erratically on a highway such as Route 206 is a more immediate threat. In such urgent situations, a police officer need not wait for corroboration that might be fatal to an innocent member of the public or to the driver himself.
>
> [*Id.* at 226].

The *Golotta* Court explained that the "nature of the intrusion," specifically, the difference between "an investigatory stop" and "a full-blown search" are relevant circumstances to be considered "in assessing the reasonableness of the government's conduct." *Id.* at 220. It distinguished "the narrow question," where the anonymous call forms the basis for a stop, from the more intrusive conduct of a search of the contents of a vehicle. *Id.* at 226.

In the present case, the police officers received a dispatch that headquarters had gotten an anonymous tip that someone in a burgundy Durango with a temporary tag was flashing a gun at a certain location. It was 2:30 a.m. When they arrived at the location, they found the vehicle, as described, parked,

with three occupants inside. Under their community caretaking function, the police were justified, absent the tip, in conducting an investigatory stop to determine if help was needed based on the circumstances of an occupied vehicle parked on the roadway in the wee hours of the morning. Beyond that, the existence of the tip, the lateness of the hour, and the confirmation of the type, color, and location of the vehicle reported in the tip justified an investigatory stop to permit the police to inquire as to what the occupants of the Durango were doing. *See State v. Nishina*, 175 *N.J.* 502, 513 (2003).

Where we part company with the State is with its contention that the tip provided justification for *Terry* pat-down searches and the search of the vehicle. The pat-down searches of the driver and occupants and the search of the Durango were based solely on an unidentified anonymous tip. There are simply no other facts in the record demonstrating that the police had an objectively articulable and reasonable basis to believe the subject of the stop was armed and dangerous. The circumstances also did not present a well-grounded suspicion that a crime had been or was about to be committed. *State v. Deluca*, 168 *N.J.* 626, 632-33 (2001). Similar to the circumstances in *J.L.*, all the police had to go on was the "bare report of an unknown, unaccountable informant" that someone was seen flashing a gun. *See J.L.*, *supra*, 529 *U.S.* at 271, 120 *S.Ct.* at 1379, 146 *L.Ed.*2d at 260. There is nothing in the record before us establishing the required indicia of reliability to justify the more intrusive pat-down or vehicular searches.

We briefly address the State's claim that defendant abandoned the gun, thereby relinquishing his expectation of privacy under the Fourth Amendment. Generally, we decline to consider issues that were not presented at trial. *Alan J. Cornblatt, P.A. v. Barrow*, 153 *N.J.* 218, 230 (1998); *Saul v. Midlantic Nat'l Bank/S.*, 240 *N.J. Super.* 62, 82 (App.

Div.), *certif. denied*, 122 *N.J.* 319 (1990). It is well settled that "[q]uestions not raised below 'will ordinarily not be considered on appeal.'" *State v. Cryan*, 320 *N.J. Super.* 325, 332 (App. Div. 1999) (quoting *State v. Bobo*, 222 *N.J. Super.* 30, 33 (App. Div.) 1987)); *see also State v. Lakomy*, 126 *N.J. Super.* 430, 437 (App. Div. 1974). The State's contention that defendant abandoned the gun was not argued in the Law Division as a basis for resisting defendant's motion to suppress. Consequently, it was never ruled upon by the trial judge and the record was not fully developed in that regard. We must, of course, consider the suppression motion solely on the evidence presented at the hearing below. *See State v. Gibson*, 318 *N.J. Super.* 1, 9 (App. Div. 1999). Nevertheless, we consider the issue.

The State bases heavy reliance on *State v. Burgos*, 185 *N.J. Super.* 424 (App. Div. 1982), in support of its contention that defendant abandoned the gun. It argues that "defendant's act of placing the gun under the front seat of a car that did not belong to him and then exiting the vehicle should be viewed as analogous to a drug dealer stashing narcotics." In *Burgos*, we held that the defendant who stashed his drugs underneath a parked car on a public street "had no protected Fourth Amendment rights in the narcotics stash maintained remotely from his person." *Id.* at 426. Quoting from the Supreme Court of Minnesota, in *City of St. Paul v. Vaughn*, 237 *N.W.*2d 365 (1975), we noted:

> "[T]he question is whether the defendant has, in discarding the property, relinquished his reasonable expectation of privacy . . . .
>
> Where the presence of the police is lawful and the discard occurs in a public place where the defendant cannot reasonably have any continued expectancy of privacy

> in the discarded property, the property will be deemed abandoned for the purpose of search and seizure."
>
> [*Burgos*, *supra*, 185 *N.J.* at 427 (quoting *Vaughn*, *supra*, 237 *N.W.*2d at 370-71) (internal citations omitted).]

Defendant testified at his plea hearing that no one was in the car when he placed the gun under the passenger seat. He claims that the other occupants did not know it was there. However, we need not rely on defendant's testimony to resolve the abandonment issue because the police were not lawfully in the vehicle when they conducted the search. Beyond that, the Durango was not a public place. Although not the basis for our decision, defendant's testimony that he did not tell the others that he had hidden it under the seat is consistent with a continued expectation of privacy. Indeed, the State's dismissal of the indictment against the other occupants is indicative that the State had no proof to the contrary. We reject the State's contention that the evidence established that defendant abandoned the gun.

Finally, we note that when defendant provided the factual basis for his plea to resisting arrest he agreed that he used force against the police after they informed him that he was under arrest for disorderly conduct. Thus, the resisting arrest offense was not connected to the arrest resulting from the search and recovery of the gun. Accordingly, we reverse only those convictions for unlawful possession of a weapon and possession of a weapon by those previously convicted.

The State concedes that defendant is otherwise entitled to a remand on the extended term imposed under *State v. Pierce*, 188 *N.J.* 155 (2006). However, defendant's challenge to the extended term imposed on the conviction for possession of a weapon by those

previously convicted is rendered moot by our decision reversing that conviction. Defendant does not challenge the five-year sentence imposed for resisting arrest. The matter is therefore remanded for entry of a judgment in accordance with this opinion.

Reversed in part and remanded.

SUPERIOR COURT OF NEW JERSEY

Chambers of
Joseph P. Perfilio
Judge

Court House
Elizabeth, New Jersey
07207

LETTER OPINION
NOT FOR PUBLICATION WITHOUT APPROVAL
OF THE COMMITTEE ON OPINIONS

October 28, 2005

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Re: State v. Cadree Matthews, et alds
Ind. No. 05-05-0554

This is a Motion to Suppress Evidence seized in a motor vehicle on February 19, 2005. A hearing was held on October 24 which included the testimony of Officer James Edgar and the arguments of counsel. The motion to suppress is hereby denied for the reasons set forth herein.

On February 19, 2005 Officer James Edgar of the Linden Police Department was patrolling the area of east St. George Avenue in a marked patrol vehicle with his partner, Officer Birch. At around 2:34 a.m. the officer received a report from police headquarters that someone in a burgundy Dodge Durango with temporary plates was flashing a gun in a rear window. The report specified that the location of the Durango was the 1100 block of East St. George Avenue. Officer Edgar arrived at the reported location within "a minute or so" after the report. The area was described as a well-lit business area. He spotted a burgundy Dodge Durango with temporary plates with tinted windows in a parked position on St. George Avenue in the 1100 block. The vehicle was occupied.

The officer radioed for back up in what he described as a "high-risk" traffic stop in that an alleged handgun was involved. Officer Edgar's vehicle and another back-up police vehicle converged on the suspect vehicle by pulling up behind it and preventing it from moving from the space it was parked in. Defendant Clarence Miller, the driver of the vehicle, was ordered to shut off the ignition and put the keys on top of the vehicle. He complied. Officer Edgar indicated that he took cover to observe the car and the occupants while his partner proceeded with the investigation. Miller was ordered out of the vehicle by Officer Birch and was taken to a secure area where a pat-down search was conducted for weapons. None were found. Defendant Robert Knight, seated in the

rear of the vehicle, was then ordered out of the vehicle and taken to a secure area, was patted down with the same results. Alisha Johnson, the passenger in the right front seat, was ordered out of the vehicle, taken to a secure area and was patted down with the same results. No weapons were found on any of the three occupants of the vehicle. One of the officers then searched the interior of the vehicle and discovered a 22-caliber RG24 revolver under the right front seat of the vehicle.

After the revolver was retrieved, defendant Cadree Matthews attempted to reach the Durango and the officers twice instructed him to leave the area but he persisted and became increasingly irate and was placed under arrest for disorderly conduct.

It is uncontested that the report received by the police officers was from an anonymous source. No name was provided, no method of receiving the report was testified to, there was no indication of whether this report resulted from a 911 call or otherwise. There was no evidence that the location was in a high-crime area. There was no testimony about fugitive gestures or movements.

What can be inferred from the above factual information provided by the testifying officer is that the report he received from headquarters came from an anonymous caller who was an eyewitness to an ongoing evident "flashing a gun in the rear window" which occurred nearly contemporaneously with or shortly before the call. It also appears that the police officers contemporaneously or nearly so came upon precisely the vehicle referred to by the caller with temporary license tags in almost exactly the location given by the caller. Further, the officer's testimony that he came upon the vehicle a minute or so after the report, that it was a "high-risk" traffic stop, and that he took cover while the other officers proceeded to make inquiry all indicate that because of the nature of

the report there was a concern for the officers' and the public safety.

A warrantless search for motor vehicles *prima facie* is invalid unless it comes within one of the judicially created exceptions. In New Jersey there are various motor vehicle exceptions. The principle rule in New Jersey is set forth in *State v. Cook*, 167 *N.J.* 657 where the court set forth a requirement of exigent circumstances coupled with probable cause in order for a warrantless search of the vehicle to be valid.

However, other warrantless searches are permitted where a vehicle is stopped for either investigative purposes or community caretaking purposes.

The State relies upon *Terry v. Ohio*, 392 *U.S.* 1 which authorizes an investigative stop which requires an articulable and reasonable suspicion for the stop. The determination of reasonable and justifiable suspicion is highly fact sensitive. As has been often quoted, justifiable suspicion is more than a mere hunch yet does not rise to the level of probable cause.

This case lies somewhere between *State v. Golotta*, 178 *N.J.* 205, a motor vehicle stop based on the "anonymous' tip of erratic driving from a 911 caller, and *State v. Goree*, 327 *N.J. Super.* 227, an anonymous tip about a man with a gun in a car. In *Goree* an officer of the Camden City Police Department was dispatched to a specific location because, "we got a call that said there was an individual in a purple and green Jeep in possession of handgun." Unlike the case at bar, the officer did not see anything which confirmed the anonymous tip. The green and purple vehicle was a block away from where the defendant was located. No time frame is specified between the time of the police dispatch and the confrontation with the defendant. The caller made no reference to anything the man was doing with the gun. No search

of the vehicle was involved but a pat-down search of a person was attempted even though the police officer tried to pat down the defendant in the *Goree* case, defendant refused and became belligerent. He then saw the defendant go inside one of his pant's pocket, pull out a clear bag with pink items in it consistent with a package of narcotics. As in the case at bar, the *Goree* case was a case requiring reasonable suspicion under *Terry v. Ohio supra*. The sole issue in that was whether a limited pat down for the purpose of protecting officers was justified. In the case before us here, unlike *State v. Goree*, the anonymous tip was "precisely accurate" as it was in the case of *State in the interest of H.B.* 75 *N.J.* 243. Here, the precise vehicle, a burgundy Dodge Durango with temporary plates was located within a minute or so after the call of dangerous activity taking place in that vehicle. The vehicle was in precisely the location specified by the caller. This is not a case as in *Goree* where the tipster alerts the police of a concealed weapon, a clandestine possessory offense "where corroboration of the predictive elements of a tip may be the only means of ascertaining the informant's basis of knowledge." *State v. Golotta, supra* at 215, citing *United States v. Wheat*, 278 F3rd 722 at 734. Here the tipster's information is closer in kind to that specified in *State v. Golotta* where the clear inference from the call was that the caller was an eyewitness to a threatening and dangerous activity.

All of the facts support the police right to stop the vehicle and remove the occupants of the vehicle and to conduct a pat-down search. *Terry v. Ohio, supra.*; *State v. Smith, supra.*; *Pennsylvania v. Mimms*, 434 *U.S.* 106; *State v. Conquest*, 243 *N.J. Super.* 528; *State v. Carter*, 235 *N.J. Super.* 232; *State v. Wanczyk*, 201 *N.J. Super.* 258. Here, the Officers articulable, reasonable and justifiable cause to protect themselves and the public. Safety of the officers is both legitimate and weighty. *Terry, supra.* The pat-down search revealing negative results, the question

then becomes whether or not the officers violated any of the defendants' rights by going further and searching the motor vehicle or whether the officers, having found no weapons on the pat-down search, should have permitted the occupants of the vehicle to return to the vehicle without securing that vehicle to assure that there are no guns in the vehicle. Stating the question states the answer. The same exigencies, articulable suspicion, and justification that allows the pat-down for the protection of the officers and the public, allows the minimal intrusion into the vehicle compartment to make sure the vehicle was safe for the public and the officers. To conduct a protective weapons search of the car, the police are required to conform to the *Terry* standard. *Michigan v. Long*, 463 *U.S.* 1032; *State v. Lund*, 119 *N.J.* 35. Here the information and confirmation of same provides the basis for the validity of the stop and the scope of the search to the inner
compartment of the vehicle was reasonably confined to safety concerns.

SO ORDERED,

JOSEPH P. PERFILIO, J.S.C.

JPP/cs
Attachment